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TRANSPORTATION CONTROLS: TIME TO CLEAR THE AIR

I. Introduction

The Clean Air Act (Act)¹ was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."² Amendments under consideration by Congress may curtail the Act's effectiveness in certain areas,³ necessitating the utilization of additional air pollution control strategies, such as the use of transportation control measures. Transportation controls reduce the high levels of air pollution caused by motor vehicles in urban environments.⁴

1. 42 U.S.C. §§ 7401-7642 (Supp. I 1977 & Supp. II 1978 & Supp. III 1979).

2. *Id.* § 7401(b)(1). Several other purposes also are enumerated by the Act, including the promotion of research and development programs in the area of air pollution, provision of technical and financial assistance to the states for development and implementation of air pollution control programs, and promotion of regional air pollution control programs. *Id.* §§ 7401(b)(2)-(4).

3. Although there appear to be conflicting views regarding the actual substance of proposed amendments to the Clean Air Act, a legislative draft released by the Environmental Protection Agency on September 4, 1981 seemed to recommend elimination of specific programs for nonattainment areas, such as annual incremental emission reductions; elimination of programs to prevent significant deterioration of clean air, such as removal of air quality monitoring from the program; mandated use of cost-benefit analysis prior to establishment of any regulation or standard, changing the definition of 'hazardous air pollutant' to incorporate cost considerations; relaxation of requirements for automobile emissions, and permitting the agency to exercise its discretion in penalizing noncompliers and mitigating penalties. N.Y. Times, Sept. 4, 1981, at A1, col. 5. Earlier Reagan Administration proposals had included an adjustment of the attainment deadline for primary standards from 1982 to perhaps 1987. N.Y. Times, Aug. 6, 1981, at A11, col. 1. A document originating in the House of Representatives also purported to advance the Administration's position on the Clean Air Act, and its provisions were far more extensive than were those of the EPA draft released in September. STAFF OF HOUSE SUBCOMM. ON HEALTH AND THE ENVIRONMENT, MEMORANDUM ON THE ADMINISTRATION'S DRAFT PROPOSAL FOR AMENDING THE CLEAN AIR ACT, 97th Cong., 1st Sess. (1981) [hereinafter cited as MEMORANDUM]. The House memorandum noted that the Administration favored repeal of the nonattainment program, including elimination of sanctions for failure to submit a satisfactory State Implementation Plan (SIP), elimination of the requirement that EPA promulgate regulations for a state if the state fails to do so, and elimination of the automobile inspection and maintenance program; establishment of a presumptive validity for submitted SIP's; elimination of the program to prevent deterioration of clean air except in national parks and wilderness areas; repeal of secondary standards, *see* note 11 *infra*; relaxation of automobile emission standards; and discretionary use of enforcement orders and penalties by the EPA. *Id.*

4. *See* note 18 *infra* for a discussion of transportation controls. *See also* COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT (1980), for a discussion of air quality problems in various urban areas. The report based its findings on the number of days per year in which the concentration of particular substances ex-

This Note discusses the nature of transportation controls and transportation control plans (TCP) adopted by New York and Texas.⁵ These states have adopted very different systems of transportation control with the resources available to them. The TCP promulgated by New York relies heavily on traffic flow regulations and improvement of mass transit facilities⁶ to achieve its objectives, while the TCP commitments included in the Texas state plan emphasize van and car pool programs, as well as expanded park and ride facilities.⁷ This Note examines the litigation resulting from the implementation of the New York and Texas transportation control measures. In addition, the legal implications of parking restrictions, traffic flow regulations, motor vehicle inspection and maintenance programs, and differential toll rates are reviewed, along with the practical problems involved in implementing van and car pool programs and toll strategies.

ceeded the standards set by the EPA in a given city. Any day on which the National Ambient Air Quality Standard (NAAQS) for a substance (such as ozone, carbon monoxide, and sulfur dioxide) was violated was characterized as unhealthful, and the aggregate number of such days was utilized as the measure of air pollution in the various cities. *Id.* at 146. The report notes that high levels of ozone and carbon monoxide were responsible for unhealthful air in the urban areas. In Los Angeles and Philadelphia, for example, unhealthful air pollution levels were due to excessive amounts of ozone, while in Chicago and Denver, violation of acceptable air quality standards was due to carbon monoxide concentrations. *Id.* at 153. For a further discussion of NAAQS, see note 11 *infra*.

5. In 1978 several major urban areas still were experiencing severe air pollution problems. For example, air quality in New York and Los Angeles failed to achieve nationally acceptable standards on 174 and 206 days, respectively. COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT 146 (1980). In addition Houston's air pollution level exceeded national standards for 94 days in 1978. Although the absolute number of days in violation of EPA standards was much lower in Houston than in New York, Houston's statistic represented a threefold increase over its own figure for 1974. *Id.*

6. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN (1979). Traffic flow measures involve road reconstruction, traffic engineering improvements, and utilization of new traffic management strategies. Demonstration projects currently are underway on several major traffic arteries in the New York City area to assess the effectiveness of improved traffic flow systems on air pollution. *Id.* at V-74. The public transportation aspect of the SIP proposes to implement improvement of the mass transit system by the use of more effective management techniques; rehabilitation of the system's stations, equipment, and maintenance facilities, promotion of the system through public information, and fare stabilization. 45 Fed. Reg. 43798 (1980).

7. See HOUSTON-GALVESTON AREA COUNCIL, FIRST ROUND OF COMMITMENTS ON TRANSPORTATION CONTROL (1981) [hereinafter cited as HOUSTON-GALVESTON AREA COUNCIL]. The Houston-Galveston Area Council is an intercity agency responsible for transportation and air quality planning. One of its primary duties is to assist in the development of the Texas SIP. The Council's first set of planning commitments relies heavily on van pool and park and ride programs to implement air pollution reductions in the Houston-Galveston area by 1987. See HOUSTON-GALVESTON AREA COUNCIL at I-3.

II. The Statutory Framework

The Clean Air Act was passed in 1970 in the form of extensive amendments to existing air pollution control legislation.⁸ The Act has been amended twice since 1970, first by the 1974 amendments which promote the increased use of coal⁹ and second, by the 1977 amendments which resolve certain practical and legal problems concerning the implementation of the 1970 provisions.¹⁰

The Act utilizes a variety of methods for improving national air quality,¹¹ including the requirement that states promulgate State Im-

8. In *Train v. NRDC*, 421 U.S. 60 (1975), the Court recounted the history of clean air legislation prior to 1970. As early as 1955, Congress had begun to promote the study of air pollution. The first Clean Air Act was passed in 1963, Pub. L. No. 88-206, 77 Stat. 392 (1953), but its provisions generally were limited to support of research efforts and local air pollution control agencies. The Air Quality Act of 1967 Pub. L. No. 90-148, 81 Stat. 485 (1967), increased federal supervision of local air pollution activities, but largely retained the philosophy that primary responsibility for pollution abatement remained with the states and their subdivisions. *Train*, 421 U.S. at 63-64.

9. Pub. L. No. 93-319, 88 Stat. 246 (1974). At that time Congress mandated conversion of major oil-and-gas-burning facilities to coal, and permitted a relaxation of emission standards if needed to accomplish this objective. AMERICAN LAW DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, REPORT ON THE CLEAN AIR ACT IN THE COURTS, 97th Cong., 1st Sess. 2 (Comm. Print 1981) [hereinafter cited as AMERICAN LAW DIVISION.].

10. Pub. L. No. 95-95, 91 Stat. 685 (1977). The 1977 amendments dealt, in part, with nonattainment of ambient standards by statutory deadlines, *see* note 11 *infra*; pollution from federal facilities; revision of acceptable auto emission levels; and pollution limits in clean air areas. *Id.* at 3. Among the issues that remain unresolved are certain aspects of the state-federal relationship, in particular the ability of the EPA to compel a state to enact the legislation or regulations necessary for implementation of a particular program. This problem first arose in the mid-1970's but has yet to be definitively resolved. For example, in *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), the court invalidated EPA-promulgated transportation control provisions requiring the District of Columbia to, among other things, establish a motor vehicle inspection and maintenance program, retrofit vehicles with emission control devices, and purchase new buses. The court also noted that the EPA Administrator was, in its opinion, not empowered to impose sanctions upon states for non-implementation. This decision was later vacated in *EPA v. Brown*, 431 U.S. 99 (1977), but the issue remained unresolved as the federal party already had renounced its intention to pursue the disputed course of action. In a subsequent decision involving similar control measures, the District of Columbia Circuit Court reinstated its earlier holding, invalidating the retrofit and bicycle lane provisions of the EPA-promulgated regulations. *District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977).

11. The EPA is authorized to formulate National Ambient Air Quality Standards (NAAQS). 42 U.S.C. § 7410(a)(1). NAAQS establish both primary and secondary standards for various substances. Primary standards involve protection of the public health, *id.* § 7409(b)(1), while secondary standards involve protection of the public welfare, *id.* § 7409(b)(2), *e.g.*, "effects on soils, water, crops, . . . property, . . . as well as effects on economic values and on personal comfort and well-being," *id.* §

plementation Plans (SIP)¹² which enumerate and describe methods for controlling air pollution. Each SIP must contain a TCP if necessary

7602(h). Opposition to EPA-promulgated NAAQS often has led to court action. In *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.) *cert. denied*, 449 U.S. 1042 (1980), the plaintiffs sought review of the ambient air quality standards for lead. The court found that the EPA need not consider economic or technological feasibility in establishing the standards, since legislative intent indicates that the achievement of healthful air quality was Congress' primary goal in enacting the legislation. *Id.* at 1148-49. If the EPA has not yet formulated a standard for a particular substance the government can still seek enforcement of air quality control on its own property. *See, e.g., United States v. Atlantic Richfield Co.*, 478 F. Supp. 1215, 1218-19 (D. Mont. 1979) (suit by the United States in its common law capacity to enjoin flouride emissions from polluting the air resources of Flathead National Forest and Glacier National Park). 42 U.S.C. §§ 7470-7479 relate to deterioration in clean air areas. The principal purpose of these sections is to promote the coordination of economic growth with maintenance of existing clean air resources. *Id.* § 7470. National parks and wilderness areas are enumerated specifically as areas to be protected from air quality deterioration. *Id.* § 7472. The method employed to prevent deterioration of clean air areas is the establishment of baseline concentrations for each pollutant and of maximum allowable increases for each substance. *Id.* § 7473. 42 U.S.C. § 7411 sets standards of performance, such as permissible emission limitations, for any stationary source (*e.g., a factory*), the construction or modification of which began after the publication of standards for that type of source. *Id.* §§ 7411(a)(1)-(2). *Portland Cement Ass'n v. Train*, 513 F.2d 506, 509 (D.C. Cir.), *cert. denied*, 423 U.S. 1025 (1975), affirmed the EPA's ability to promulgate stationary source emission standards for new or modified cement plants. The standards established by the EPA must, however, be supported by adequate data in the record. *See, e.g., National Lime Ass'n v. EPA*, 627 F.2d 416, 452-54 (D.C. Cir. 1980) (new source standards for lime manufacturing plants were challenged successfully as being explained inadequately by EPA's documentary evidence).

42 U.S.C. § 7412 relates to hazardous air pollutants. A hazardous air pollutant is one which "may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." *Id.* § 7412(a)(1). The EPA Administrator is authorized to promulgate emission standards for such sources, *id.* § 7412(b), and to enforce the standards, *id.* § 7412(d)(2).

Nonattainment areas are regulated in 42 U.S.C. §§ 7501-7508. A nonattainment area is one which exceeds NAAQS for a particular pollutant. *Id.* § 7501. The Act requires that state plans provide for air pollution control measures designed to improve air quality in nonattainment areas, *id.* § 7502(a)(1), and for control of emissions from both existing sources in the area and new or modified stationary facilities, *id.* §§ 7502(b)(3)-(6).

42 U.S.C. §§ 7521-7551 authorizes the EPA to establish emission standards for new motor vehicles and motor vehicle engines, *id.* § 7521(a)(1), and to regulate fuels, *id.* § 7545. In *Ethyl Corp. v. EPA*, 541 F.2d 1, 7 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976), the court upheld the EPA's ability to promulgate regulations which reduced the lead content of gasoline. The success of these strategies is demonstrated by a recent study of 23 urban areas which indicated that violations of National Ambient Air Quality Standards decreased 18% between 1974 and 1978. COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT 146 (1980). In 1974 the aggregate number of days in which national air quality standards were violated was 1,985 while the number of days in violation in 1978 fell to 1,637. *Id.* at 147.

12. 42 U.S.C. § 7410(a)(1). Each state must promulgate a plan to control the pollution from a particular source within nine months after the Administrator formulates a primary or secondary standard for that pollutant. The Act also provides for a

for achievement of satisfactory air quality levels.¹³ The Environmental Protection Agency (EPA), the federal agency responsible for achieving Clean Air Act objectives, has been granted a wide variety of implementation and enforcement powers.¹⁴ In addition, private rights of action¹⁵ and federal funding sanctions against recalcitrant states¹⁶ are authorized by the Act.

three year implementation period following the date of plan approval, *id.* § 7410(a)(2)(A)(i), with a two year extension to be granted at the Administrator's discretion, *id.* § 7410(e)(1).

13. 42 U.S.C. § 7410(a)(2).

14. The Administrator is responsible for the setting of National Ambient Air Quality Standards, 42 U.S.C. § 7410(a)(1); approval or disapproval of an SIP submitted by a state, *id.* § 7410(a)(2); promulgation of the EPA's own regulations for any state which fails to submit a satisfactory plan, *id.* § 7410(c)(1); and extension of compliance deadlines in appropriate circumstances, *id.* § 7410(e)(1). The Administrator is also the initiating party in a suit against violators, and his interpretation of the air pollution regulations is accorded significant weight by the courts. For example, in *Chrysler v. EPA*, 631 F.2d 865 (D.C. Cir. 1980), Chrysler had been ordered by the Administrator to recall all 1975 vehicles of certain engine displacements which failed to meet the established auto emission standards. Chrysler's challenge of the Administrator's interpretation of the regulation in question was denied, with the court noting that the Administrator's interpretation, although not controlling, is certainly to be considered authoritative *Id.* at 884.

The United States Supreme Court upheld executive agency discretion in *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980), a case that involved opposition to a proposed low income housing project in Manhattan. The Court said that as long as the federal agency complies with the procedural requirements of the National Environmental Policy Act its decision will not be disturbed by the judiciary. *Id.* at 227-28. The right of agencies to formulate their own procedures in areas for which they are substantively responsible was earlier upheld in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

15. 42 U.S.C. § 7604. Several types of citizen suits are authorized by the Act, including actions against pollution sources, governmental entities and the EPA itself. In *Gardeski v. Colonial Sand & Stone Co.*, 501 F. Supp. 1159, 1168 (S.D.N.Y. 1980), a citizens' group sought to compel compliance with federal pollution standards. The court approved the utilization of such citizen suits against private pollution sources in cases where governmental enforcement efforts are less than diligent. *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976), involved a citizens' suit against New York State to obtain court-mandated implementation of the New York TCP. Plaintiffs were granted the requested relief, thus affirming judicial acceptance of citizen suits against governmental instrumentalities. Citizen suits against the EPA generally have involved challenges to EPA-promulgated regulations, *e.g.*, *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) (upholding the Administrator's transportation control measures for the Boston area); and challenges to the ambient standards set by the EPA, *e.g.*, *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (challenging the EPA standards on permissible levels of ozone); *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.) (petition to review EPA-promulgated standards for lead), *cert. denied*, 449 U.S. 1042 (1980).

16. 42 U.S.C. § 7506(a)-(c) provides for withholding of federal funds for a state's failure to submit an original or revised plan or to implement a plan for a non-attainment area and for loss of federal air quality planning and regulatory funds for failure to implement a state's plan. It has been suggested that the language of § 7506(c) may result in withholding of federal funds for any state project or planning

Transportation controls "[a]re measures designed to reduce emissions from transportation vehicles after they have left the manufacturer."¹⁷ Transportation control provisions of the Clean Air Act permit the use of a variety of programs and procedures to reduce and regulate vehicular air pollution including: motor vehicle inspection and maintenance; improved public transit; bus and car pool lanes; staggered work hours; control of on-street parking; construction and operation of park and ride facilities; employer participation in car pooling, van pooling, and mass transit; road use charges, tolls, and differential toll rates for single occupancy vehicles; and improved traffic flow.¹⁸

Proposed changes to the transportation control measures of the Act eliminate vehicle inspection and maintenance as a required part of any regulation and relax carbon monoxide and nitrogen oxide standards.¹⁹ Since carbon monoxide is one of the leading sources of air

activity which might contribute to pollution levels in non-attainment areas. Comment, *The Implementation of Transportation Controls under the 1977 Clean Air Act Amendments*, 50 U. COLO. L. REV. 247, 267 (1979). These sanctions would apply to such state endeavors as highway and sewage projects, both of which could present significant pollution problems. Congressional Research Service, Environment and Natural Resources Policy Division, Issue Brief No. IB80078, *The Clean Air Act: An Overview* 4 (July 5, 1981).

17. AMERICAN LAW DIVISION, *supra* note 9, at 71.

18. 42 U.S.C. § 7408 (f)(1)(A). Vehicle inspection and maintenance programs involve annual measurement of vehicle exhausts coupled with penalties for noncompliance with the applicable emission standard. A penalty that has been utilized extensively is denial of registration to noncomplying vehicles. In *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981), the court validated the EPA's ability to promulgate a regulation withholding registration from vehicles failing to pass the emission test if a state refuses to formulate such a regulation. Motor vehicle inspection programs can be operated either by the state or by private contractors or garages. New York has concluded that both systems are cost-effective, although the expenditure required for a state-run system would be substantially greater. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN V-9-12 (1979).

The other major transportation control devices, such as bus and car pool lanes, park and ride facilities, and control of on-street parking, are designed to reduce the number of cars on the road by discouraging motorists from driving to work. Traffic flow regulations seek to improve the management of roadway capacity, often accomplished by control of access to various road arteries, reversible lanes, and roadway widening. *Id.* at V-69.

The Act also provides for other transportation control measures, such as reduction of extended idling in order to reduce emission production, bicycle lanes, staggered work hours, limitation on use of certain areas to non-motorized vehicles or pedestrians, and retrofit (installation of pollution control devices) of on-the-road vehicles. 42 U.S.C. § 7408(f)(1)(A).

19. MEMORANDUM, *supra* note 3, at 2, 5. The standard for carbon monoxide would be changed from 3.4 grams per vehicle mile to 7.0 grams per vehicle mile for passenger cars; the standard for nitrogen oxide would be changed from 1.0 grams per

pollution,²⁰ environmental groups are strongly opposed to any alteration of Clean Air Act provisions.²¹ However, whether or not Congress amends the Act as proposed, the increasing number of motor vehicles operating within urban areas²² necessitates expanded utilization of other transportation control strategies.

III. State Plans for Transportation Control

Pursuant to the 1977 amendments to the Clean Air Act, states were required to submit revised SIP's by July 1, 1979.²³ Implementation of the transportation control provisions of these revised SIP's will involve some of the problems which New York and Texas have encountered in implementing their TCP's.

A. The New York Plan

New York was one of the first states to submit an SIP to the EPA for approval.²⁴ The plan incorporated numerous transportation control

vehicle mile to 1.5 grams per vehicle mile for passenger cars (beginning in 1983). *Id.* at 5.

20. COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT 153 (1980). Carbon monoxide was the leading cause of NAAQS violation in 6 of the 23 urban areas. *Id.* Although the overall level of carbon monoxide remained relatively unchanged from 1970 to 1978 the sources did not necessarily remain the same; increased motor vehicle emissions were offset by reduced carbon monoxide emissions from burning solid wastes. *Id.* at 171.

21. See, e.g., Robinson, *Debating Revisions to Clean-Air Act*, N.Y.L.J., Sept. 25, 1981, at 1, col. 1. Critics of the proposed revisions believe that emphasis will be shifted from health to cost considerations in establishing and enforcing standards. See also N.Y. Times, Aug. 6, 1981, at A11, col. 1, in which the fear of deteriorating air quality is expressed.

22. There were approximately 118 million automobiles and 31 million trucks on American roads in 1979. 29 BUS. & SOC'Y REV. 55, 55-56 (1979). The number of vehicle-miles traveled increased 30% between 1970 and 1978. COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT 171 (1980).

23. 42 U.S.C. § 7410 (a)(3)(D). By September 2, 1980 all 50 states and the District of Columbia submitted their SIP's. The EPA deemed forty of the plans to be complete. COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT 183 (1980). The plans were required to include measures for achievement of carbon monoxide and ozone standards by 1987, with provision for mandatory motor vehicle inspection and maintenance programs if the state cannot comply with the carbon monoxide and ozone standards before 1987. COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT 183 (1980). The motor vehicle inspection and maintenance programs were required to be operational by the end of 1981 if decentralized, and by the end of 1982 if centralized. *Id.* See note 18 *supra* for a discussion of vehicle inspection and maintenance programs. Twenty-nine states are required to implement motor vehicle inspection and maintenance programs because they requested compliance extensions until 1987. These programs affect various metropolitan areas including Atlanta, Baltimore, Chicago, Denver, Houston, Los Angeles, New York and Philadelphia. A CITIZEN'S GUIDE TO CLEAN AIR AND TRANSPORTATION 59 (1980).

24. Gerrard, *The Transportation Control Plan Rides Again*, 6 N.Y. AFFAIRS 21, 22 (1980). The New York plan was submitted by the April, 1973 statutory deadline and

strategies including: emission control strategies;²⁵ traffic control policies such as increased enforcement of traffic and parking regulations, selective ban on taxi cruising, reduction of parking spaces in Manhattan, and tolls on all East River and Harlem River Bridges;²⁶ and provisions for improved mass transit facilities.²⁷

Following EPA approval, the plan was challenged by citizens' groups in *Friends of the Earth v. EPA*.²⁸ It was alleged that the plan contained vague and ambiguous implementation procedures and lacked essential provisions, including specific conformance time-tables and a transit fare freeze.²⁹ Although the court affirmed EPA's plan approval,³⁰ the state avoided implementing the transportation control measures. Friends of the Earth returned to court³¹ to seek an order compelling performance. The United States Court of Appeals for the Second Circuit ordered implementation,³² but the district court refused to enforce the compliance order.³³ The plaintiffs then initi-

was approved on June 22, 1973. The EPA granted a requested extension to December 31, 1976 for compliance with air quality standards. *Id.*

25. *Id.* at 23. Emission control elements of the SIP involved vehicle turnover, replacing older vehicles with new emission-efficient ones; retrofitting trucks with pollution control devices; motor vehicle inspection and maintenance programs; elimination of leaded gasoline; and emission controls for taxis. *Id.*

26. Other measures designed to decrease traffic congestion included after-hours deliveries to stores, offices, and factories; and staggered work hours. *Id.* Several different types of flexible work schedules exist, but the most common are flexitime, where the individual works a flexible number of hours per day, and a compressed work-week, in which two to four days usually are worked each week rather than five. U.S. NEWS & WORLD REP., Sept. 28, 1981, at 76.

27. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN I-5 (1979). The mass transit section of the 1973 document included provisions for increased express bus service, marketing the public transit system, time table simplification, reduced fare, advance fare payment, integration of bus and subway facilities, and rehabilitation of the existing transit system.

28. 499 F.2d 1118 (2d Cir. 1974). Friends of the Earth is an active environmental group currently maintaining a membership of between 25,000 and 30,000.

29. *Id.* at 1123-25.

30. *Id.* at 1124. The court, however, was critical of the parking space reduction strategy because statements advocating reduction of on-and-off-street parking facilities in Manhattan business districts were included in the plan, without any specificity as to which facilities were being referred to. *Id.* at 1123-24. The court also required more information on the data used by the Administrator to conclude that the parking strategy would be effective, since his document assumed that a reduction in parking spaces would produce a proportional decrease in miles traveled by passenger cars, an assumption whose veracity the court questioned. *Id.* at 1125.

31. *Friends of the Earth v. Carey*, 535 F.2d 165 (2d Cir. 1976) (*Friends II*). The plaintiffs sought to enforce four of the major strategies of the 1973 SIP—parking space reduction, a taxicab cruising ban, bridge tolls, and after-hours freight deliveries. *Id.* at 171 n.7.

32. *Id.* at 179.

33. Gerrard, *supra* note 24, at 24. On July 13, 1976 the district court withdrew the compliance order which it had issued in response to the decision in *Friends II*

ated a third suit, in which the court of appeals again issued an order compelling implementation of the New York Transportation Control Plan.³⁴

New York State continued to resist the implementation of the transportation control measures and was able to obtain through the Moynihan-Holtzman Amendment³⁵ to the Clean Air Act, the relief denied it by the court. The amendment permitted the state to eliminate the bridge toll strategy from its SIP on condition that it formulate a comprehensive transit proposal within one year. The revised plan was required to include measures designed to improve mass transit and to maintain national ambient air standards.³⁶

New York formulated a revised SIP in 1979.³⁷ The new plan places primary emphasis on mass transit improvements,³⁸ seeking to maintain national ambient standards through programs involving control of land use and development, parking restrictions, express bus and car pool lanes, traffic flow controls, alternate work schedules, employer-

because it felt that the tenth and eleventh amendments to the United States Constitution prohibit the federal government from compelling a state to comply with its own SIP provisions. *Id.*

34. *Friends of the Earth v. Carey*, 552 F.2d 25, 39 (2d Cir.), *cert. denied subnom. Beame v. Friends of the Earth*, 434 U.S. 902 (1977). For a further discussion of the *Friends* cases, see Note, *Friends of the Earth v. Carey: Enforcing the Clean Air Act*, 9 TRANSP. L.J. 411 (1977).

35. Pub. L. No. 95-95, §§ 108 (d)(3)(5)(A), (B), amending § 110 (c), 91 Stat. 685, 694-95 (1977). For a further discussion see NATIONAL RESOURCES DEFENSE COUNCIL, INC., COMMENTS ON NEW YORK STATE AIR QUALITY IMPLEMENTATION PLAN FOR MASS TRANSIT IMPROVEMENTS IN THE NEW YORK CITY METROPOLITAN AREA 9-17 (1978) [hereinafter cited as NRDC]. The Amendment was signed into law in August, 1977.

36. NRDC, *supra* note 35, at 13. Congresswoman Elizabeth Holtzman had orchestrated the effort to have the bridge toll strategy removed from the New York SIP. The resulting amendment emphasized the substitution of a mass transportation control strategy for the imposition of bridge tolls and required that the state allocate adequate funds for implementation of the amended plan. The amendment also contained a provision requiring measures for the attainment and maintenance of national air quality standards in order that the air pollution benefits of tolls be retained. *Id.* at 9-17. The public transit aspect of this strategy has been interpreted by EPA Administrator Costle to require "[t]he upgrading of public transportation to the point where it is not significantly less attractive than auto travel." *Id.* at 17. The New York SIP seeks to define the improvement standard more precisely, by reference to passenger comfort, including crowding, air conditioning and noise factors. 45 Fed. Reg. 43800 (1980).

37. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN (1979).

38. *Id.* at 20-33. Provisions of the transit improvement section of the plan include a design for more effective management of the transit system (improved capital planning and project management, and improved system maintenance), stabilization of the fare, modernization of the transit facilities (air conditioning subway cars, renovating stations, and reducing subway noise are specifically advocated), and marketing the transit system.

based programs, and park-and-ride facilities.³⁹ Omitted were mandatory imposition of tolls on East River and Harlem River bridges, restrictions on taxi cruising, and motor vehicle inspection and maintenance for all but passenger cars and medallion cabs.⁴⁰ The principal reason for the major strategy change between 1973 and 1979 involved fear of the economic consequences of many of the earlier plan's provisions.⁴¹ Other concerns included the possibility of massive traffic congestion at East River toll plazas, resulting in unhealthy levels of air pollution.⁴² The EPA conditionally approved the New York SIP⁴³

39. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN (1979). The staggered work hour strategy is already widely used—9.5 million workers in the United States are involved in either flexitime or a compressed work week arrangement. The efficacy of this strategy is illustrated in Denver, where a compressed work week for about 7,000 federal employees reduced automobile travel 16%, thereby decreasing emissions, fuel consumption and traffic congestion. U.S. NEWS & WORLD REP., Sept. 28, 1981, at 76-77.

40. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN I-4-6 (1979).

41. Gerrard, *supra* note 24, at 24-25. There were claims of large business losses which would result from implementation of the program, including one estimate of "more than \$100 million" if the provisions on parking restrictions, taxi cruising, bridge tolls, and after-hours deliveries were implemented. *Id.* However, no objective data were advanced to support this view. *Id.* at 25.

42. *Id.* at 26. For a further discussion of this issue see note 107 *infra*. Toll advocates believed that the tolls would have provided enormous revenues for use in improving mass transit, while actually decreasing air pollution. NRDC, *supra* note 35, at 8. In 1973 it was estimated that the East River and Harlem River Bridge tolls would produce \$125 million annually in revenue; a 1976 estimate by the State Department of Transportation showed net revenues of \$141 million annually. *Id.* The air pollution benefits were expected to result primarily from "straightening out" trips—drivers would no longer make detours to avoid toll bridges and tunnels. After imposition of the toll plan all sources of access to Manhattan would maintain toll charges. The State Department of Transportation estimated the air pollution savings at 5-6% citywide and 9.2% in Manhattan. *Id.*

43. Conditional approval requires that the entity submit additional documentation to the EPA according to a pre-arranged schedule. 45 Fed. Reg. 33983 (1980). The provisions not related to mass transit were approved conditionally on May 21, 1980, 45 Fed. Reg. 33981 (1980). The mass transit sections were disapproved initially on June 30, 1980, *id.* 43794, due to insufficient provision for operational and management improvement and budgetary allocations. The EPA felt initially that New York's \$427 million annual commitment to the transit improvement fund was insufficient based on the budgetary figures provided. In particular, it noted that certain required costs were not accounted for in the budget at all, including maintenance costs necessary to end the deferred maintenance program, additional funds for transit police, and increased operating costs resulting from defects in certain subway cars. 45 Fed. Reg. 43800-03 (1980).

The mass transit aspect of the plan was granted conditional approval on September 9, 1981, 46 Fed. Reg. 44979 (1981), after additional information was provided to the EPA which allayed its reservations regarding the plan's adequacy. Specifically, the EPA learned that a New York tax increase would raise up to \$400 million annually for two years to erase the deficit from the M.T.A. budget. 46 Fed. Reg. 44981 (1981).

and granted New York an extension until December 31, 1987, to attain compliance with ozone and carbon monoxide standards within the metropolitan area.⁴⁴

Enforcement of the transportation control provisions of the 1979 plan by private parties will be rendered more difficult by the decision in *New England Legal Foundation v. Costle*,⁴⁵ which eliminated one type of federal sanction from application against a state for noncompliance with a transportation control plan's provisions. In an action brought by Connecticut citizens, municipalities and organizations⁴⁶ to compel the EPA to suspend federal grants⁴⁷ to New York State, the Court of Appeals for the Second Circuit affirmed the district court's⁴⁸ finding that the EPA has no mandatory duty to suspend federal grants for non-implementation of the transportation control aspects of SIP's. The court stated that the legislative history of the funding sanction provisions indicates that the sanctions only apply to plan revisions required under the 1977 Amendments. Since transportation controls were necessitated by earlier legislation the court held that TCP's were not subject to the funding sanctions.⁴⁹

In addition, the efficacy of utilizing citizen suits to compel enforcement of TCP provisions may be affected by a recent case in which a commuter organization sued the Metropolitan Transportation Authority and the Tri-State Regional Planning Commission (Tri-State)⁵⁰ to compel Tri-State to enforce the transportation provisions of the New York SIP. The plaintiffs alleged that Tri-State failed to effectively enforce or implement the transportation control strategies of the New York State Implementation Plans of 1973 and 1979. The com-

44. 45 Fed. Reg. 33982 (1980).

45. 632 F.2d 936 (2d Cir. 1980).

46. Plaintiffs alleged that air pollution from New York and New Jersey was carried to Connecticut by winds, and had a harmful effect on residents' health. *Id.* at 937.

47. See note 16 *supra* and accompanying text.

48. *New England Legal Found. v. Costle*, 475 F. Supp. 425 (D. Conn. 1979). Plaintiffs contended that the EPA had the duty to compel New York and New Jersey to revise and implement their SIP provisions on stationary sources and transportation controls. *Id.* at 429. However, the court found that the deadlines established by the 1977 amendments for attainment of standards had not yet passed. Thus, the EPA did not have a duty to promulgate regulations or invoke sanctions against a state for noncompliance. *Id.* at 432-34.

49. 632 F.2d at 938.

50. The Tri-State Regional Planning Commission is responsible for promulgating a coordinated transportation improvement program for the New York-New Jersey-Connecticut area. Its staged, multi-year Transportation Improvement Program provides for capital and operating improvements for the Tri-State area. NEW YORK STATE DEP'T OF ENVIRONMENTAL CONSERVATION, AIR QUALITY IMPLEMENTATION PLAN IV-2, IV-5 (1979).

plaint emphasized the defendant's inadequate planning for improvement of the area's mass transit instrumentalities.⁵¹ The district court ruled that Tri-State, although vested with planning authority, lacks enforcement capability.⁵² As a result, Tri-State was not held responsible for implementing transportation control strategies.

B. The Texas Plan

The Texas response to the air pollution problem posed by motor vehicles has been very different from the New York plan, dictated in large part by the absence of significant mass transit systems in its major cities. The initial commitments of the Texas TCP which recently have been incorporated into the Texas SIP by the Houston-Galveston Area Council,⁵³ emphasize the expansion of the existing van and car pool programs.⁵⁴

51. Council of Commuter Orgs. v. Metropolitan Transp. Auth., 515 F. Supp. 36, 37 (S.D.N.Y. 1981).

52. *Id.* at 38. The court noted that neither the agency nor its officers have the power to implement or enforce its recommendations, and that the legislation creating the agency expressly states that it is not subject to suit in any court. *Id.*

53. HOUSTON-GALVESTON AREA COUNCIL, *supra* note 7.

54. *Id.* at II-1. As of October 1980, 64 companies maintained van pool programs with an estimated 14,948 riders. Seven independent operators also ran such programs. It has been estimated that average employee participation in employer sponsored van pool programs is 30%, with the potential ridership in companies of 250 or more employees (in one location) to be 34,400 by 1987. BARTON-ASCHMAN ASSOCIATES, INC., EMPLOYER RELATED AIR QUALITY TRANSPORTATION CONTROL MEASURES 18-25 (1981) [hereinafter cited as BARTON-ASCHMAN]. Approximately 35% of large companies maintain car pool programs, and the level of employee participation in those programs is about 33%. *Id.* at 47-48. Approximately 2000 van pools are now in operation in the Houston-Galveston metropolitan area. It is estimated that an additional 4,400 van pools will be in operation in the area by 1987. The van pool sponsors include private employers, the Metropolitan Transit Authority, the State Department of Highways and Public Transportation, county and city entities, and private organizations serving groups of employers. HOUSTON-GALVESTON AREA COUNCIL, *supra* note 7, at II 1-3. One of the prime incentives to employer participation in the van pool program is M.T.A. cost assistance. Only 20% of the van purchase price is paid by the employer, while 80% of the cost is assumed by the M.T.A. Employers are responsible for funding the van's operating expenses. *Id.* at 11-8.

The Houston-Galveston Area Council study indicates that van pools and car pools possess substantial potential for emissions' reductions compared to other transportation control measures contained in the area-wide program. Based on a projected figure of about 6,300 vans being in operation by 1987 it was estimated that without a motor vehicle inspection and maintenance program, emission reductions would vary between 0.6% and 2.7% annually for hydrocarbons, a reduction of between 180 and 850 tons per year, with a net reduction of 1460 tons in the year 1987. BARTON-ASCHMAN, *supra* at 33-34. The car pool program is estimated to result in annual hydrocarbon reduction of 1.6% to 4.1%, without a vehicle inspection program, a decrease of between 470 and 1,280 tons annually. *Id.* at 57. These findings were

The Houston-Galveston Area Council commitments also include plans for expansion of its park-and-ride express bus program⁵⁵ and improvement of local bus service and bus maintenance facilities.⁵⁶ Traffic flow measures, including redesign of access routes into Houston, currently are under consideration for incorporation into future commitment papers.⁵⁷

Like its New York counterpart, the Texas SIP has not been free from judicial scrutiny. In *Texas v. EPA*,⁵⁸ the state challenged the EPA's power to determine the adequacy of its SIP and to promulgate additional regulations to be included in the state's plan. The United States Court of Appeals for the Fifth Circuit invoked the "arbitrary and capricious" standard as the basis for reviewing administrative agency actions⁵⁹ and held that the EPA had properly exercised its discretion in determining that the Texas plan was inadequate.⁶⁰ More importantly, the court allowed the EPA to promulgate additional regulations for a state if the provisions of the state's plan were unsatisfactory.⁶¹

The court of appeals again supported the EPA's position in *City of Seabrook v. EPA*,⁶² where a petition by a municipality and several

based on decrease in vehicle miles traveled, and the effect of that reduction on emissions' levels. *Id.* at 33.

55. The M.T.A. now maintains eleven park-and-ride lots, and express buses carry over 6,000 riders daily in each direction. The M.T.A.'s 1982 budget has committed \$41 million for expansion and construction of park-and-ride facilities. It is estimated that the new lots will provide approximately 6,600 new parking spaces. HOUSTON-GALVESTON AREA COUNCIL, *supra* note 7, at III-1.

56. The M.T.A. plans to purchase 641 new buses in the period 1982-1986, and to have a 900 bus fleet by 1987. *Id.* at IV-1.

57. *Id.* at I-2. The purpose of the traffic flow improvements would be to reduce traffic congestion by redesigning intersections, widening road surfaces, and improving traffic signal patterns. BARTON-ASCHMAN, *supra* note 54, at 13. See note 6 *supra* for a further discussion of traffic flow measures.

58. 499 F.2d 289 (5th Cir. 1974), *cert. denied*, 427 U.S. 905 (1976).

59. *Id.* at 296. The "arbitrary and capricious" standard has been utilized universally by the courts in evaluating the viability of an EPA directive since the inception of the Clean Air Act. AMERICAN LAW DIVISION, *supra* note 9, at 157. See, e.g., *American Petroleum Inst. v. Costle*, 665 F.2d 1176 (D.C. Cir. 1981) (standard applied to the Administrator's formulation of NAAQS for ozone); *South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974) (standard applied in determining the validity of an EPA-promulgated transportation plan for Boston). In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which also dealt with the validity of an administrative agency action, the Court defined "arbitrary and capricious" as "[w]hether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgement." *Id.* at 416.

60. *Texas v. EPA*, 499 F.2d at 294.

61. *Id.* However, the court did find that several of the regulations formulated by the EPA were invalid, i.e., the gasoline marketing regulations. *Id.* at 321.

62. 659 F.2d 1349 (5th Cir. 1981).

private citizens called for EPA approval of various portions of the Texas SIP to be set aside. The plaintiffs contended that the EPA's conditional approval of several sections of the plan was not authorized by the Clean Air Act. They interpreted the Act to require either approval or disapproval, while the EPA maintained its ability to grant conditional approval for substantial compliance.⁶³ The *Seabrook* plaintiffs also argued that the SIP provision on motor vehicle inspection and maintenance programs required a mandatory program, while the EPA argued that the provision only required that the program be phased in over a period of years.⁶⁴ The court upheld the EPA's position on both issues because the agency's interpretation of the regulations was not "arbitrary or capricious."⁶⁵

IV. TCP Implementation Problems

The implementation of transportation controls may produce a variety of legal and practical difficulties. Several transportation control measures, such as parking and traffic restrictions, involve a limitation of individual movement. Other transportation controls, such as the motor vehicle inspection and maintenance programs, require that states perform certain actions in order to comply with federal directives—raising the issue of infringement of state sovereignty. Finally, the implementation of van and car pool programs raises practical considerations such as insurance and tax issues.

A. Legal Implications

Transportation control measures present a variety of legal issues including constitutional questions. The viability of such regulations depends upon the nature of the individual right and the importance of the societal interest involved. Only compelling governmental interest can justify the infringement of a fundamental right.⁶⁶ However, even

63. *Id.* at 1353.

64. *Id.* at 1363-64.

65. *Id.* at 1359-64. See note 59 *supra* for a further discussion of the "arbitrary and capricious" standard. The court noted that policy considerations support the EPA's position on the conditional approval issue. One of the central purposes of the Clean Air Act is to place the principal responsibility for air pollution control on the states, and this purpose would be frustrated if promulgation of federal regulations were preferred to a commitment by the states, in conditionally approved SIP's, to make the required revisions. *City of Seabrook*, 659 F.2d at 1356.

66. Fundamental rights cannot be infringed upon by the government unless there is a compelling state interest involved. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (promotion of compelling governmental interest needed in order to limit the fundamental right to travel); *Matter of Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 494, 239 N.E.2d 891, 895, 293 N.Y.S.2d 297, 302 (1968) (only a direct

if a balancing of the interests results in a determination that the regulation is valid, any individual who sustains damage thereby may be eligible to receive compensation.

The restriction or prohibition of parking may entitle landowners within the designated areas to receive just compensation⁶⁷ for loss of traffic flow past their business establishments and reduction of access to their facilities. These two issues are often linked, as loss of traffic flow causes reduced access under certain circumstances.⁶⁸

Restrictions on access are widely recognized as constituting compensable injury to the landowner,⁶⁹ but there is substantial disagree-

and immediate adverse effect on the community's health, safety, or welfare would prelude expansion of a house of worship). Control of air pollution certainly is related to community health, but the question remains unresolved as to whether it is a compelling enough interest to permit infringement on a fundamental right.

67. The United States Constitution provides that private property shall not "[b]e taken for public use, without just compensation." U.S. CONST. amend. V. The framers of the Constitution were concerned primarily with governmental seizure of tangible property, personal property in particular, but the concept of 'property' has been expanded over the last two hundred years to include rights, privileges, and duties. Kanner, *Restrictive Covenants in Condemnation: Bringing Equity into Just Compensation*, 1976 INST. ON PLAN. ZONING & EMINENT DOMAIN 237, 239 (1976). Since the 1870's, the Supreme Court has recognized the possibility that a "taking" could exist without an actual appropriation by the government, as when there is a substantial interference with the owner's right to the use of his property through, for example, a severe regulation. *Id.* at 240-41.

The measure of compensation to be paid for property involves placing the owner in as good a position as he would have been in if the property had not been taken. Searles, *Eminent Domain: A Kaleidoscopic View*, 1 REAL EST. L. J. 226, 237 (1973). The value of the property is not necessarily its current fair market value, but its value at the "highest and best use" of which it is capable. For example, in *Glenn Houle Co. v. State*, 73 A.D.2d 794, 423 N.Y.S.2d 714 (4th Dep't 1979), the property seized consisted of a rooming house, but the area already was zoned heavy commercial. The value of the property was established with reference to the commercial use which was permissible and which provided a higher measure of compensation than would the current residential value, discounted for the time required to convert the property from one best use to another. *Id.* at 795, 423 N.Y.S.2d at 716. *See also* *Schwartz v. State*, 72 A.D.2d 490, 426 N.Y.S.2d 100 (3d Dep't 1980) (probability of waiving a covenant restricting use of the property to residential purposes was considered in determining the value of the property); *Rosenblum v. State*, 70 A.D.2d 694, 416 N.Y.S.2d 398 (3d Dep't 1979) (parcel of land designated as having a highest and best use as a gas station even though it was currently zoned commercial because there was a reasonable probability that it could be reconverted to a gas station).

68. *See, e.g., City of Colorado Springs v. Smartt*, ___ Colo. ___, 620 P.2d 1060 (1981), in which the Supreme Court of Colorado permitted the rezoning of a particular parcel of land on the condition that access be limited to a certain street, as a control on traffic flow. The court reasoned that limiting the number of access routes to the property would provide a control on the amount of noise, air pollution and traffic congestion engendered by the landowner's proposed use. *Id.* at ___, 620 P.2d at 1061-62.

69. *See State Dep't of Highways v. Davis*, ___ Colo. ___, 626 P.2d 661 (1981) (condemnation of adjoining land produced more circuitous access); *D'Addario v.*

ment as to the extent of deprivation required before the loss of access rises to the level of a compensable injury. Some courts require that loss of access be substantial.⁷⁰ For example, it has been held that required use of a more circuitous route does not constitute a compensable damage.⁷¹ However, another court considered any limitation which impedes complete and unobstructed access to constitute a compensable damage.⁷¹ However, another court considered any limitation, which impedes complete and unobstructed access to constitute a compensable injury,⁷² such as the required passage over landfill in a culvert constructed directly across the property's entrance way.⁷³ In addition, it is not certain that loss of traffic flow past a business property constitutes a compensable injury. Although diversion of traffic was deemed to constitute a compensable injury where it reduced the value of the plaintiff's property in one case,⁷⁴ another court found that the continuation of traffic flow past a landowner's property was not a property right in which the owner had a vested interest.⁷⁵

The utilization of parking restrictions as a transportation control strategy involves an additional consideration. Although local governments may impose reasonable limitations on the use of their streets and highways for purposes of public health, morals, safety or conven-

Commissioner of Transp., 180 Conn. 355, 429 A.2d 890 (1980) (restricted access due to condemnation of part of plaintiff's property); *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 274 S.E.2d 653 (Ct. App. 1980) (restriction of access amounts to a taking); *State Dep't of Transp. v. Van Willett*, 386 So. 2d 1023 (La. Ct. App. 1980) (expropriation resulted in diversion of traffic); *Legislature of County of Monroe v. Morgan*, 78 A.D.2d 761, 433 N.Y.S.2d 639 (4th Dep't 1980) (relocation of road resulted in indirect access).

70. *See, e.g.*, *Legislature of County of Monroe v. Morgan*, 78 A.D.2d 761, 762, 433 N.Y.S.2d 639, 640 (4th Dep't 1980) (property owner is not entitled to compensation for being reduced to indirect or less than ideal access).

71. *State Dep't of Highways v. Davis*, ___ Colo. ___, ___ 626 P.2d 661, 664 (1981).

72. *See, e.g.*, *Downside Risk, Inc. v. Metropolitan Atlanta Rapid Transit Auth.*, 156 Ga. App. 209, 214, 274 S.E.2d 653, 658 (Ct. App. 1980) (rendering ingress and egress more difficult constitutes a compensable injury).

73. *D'Addario v. Commissioner of Transp.*, 180 Conn. 355, ___, 429 A.2d 890, 894 (1980).

74. *State Dep't of Transp. v. Van Willett*, 386 So. 2d 1023, 1035 (La. Ct. App. 1980). The defendant failed to prove that lack of access or visibility resulting from expropriation of his property would reduce the value of that part of the tract remaining in his possession. Therefore, no severance damages were awarded.

75. *Division of Admin. v. Capital Plaza, Inc.*, 397 So. 2d 682 (Fla. 1981). The Department of Transportation widened the road abutting the plaintiff's property, and constructed a raised median to divide the directional lanes. Capital Plaza contended that the loss of traffic flow past its gas station constituted a compensable injury, but the court found that a landowner has no right to continued traffic flow past his property. *Id.*

ience,⁷⁶ classifications of regulated vehicles cannot be arbitrary or capricious. For example, an ordinance which prohibited limousine drivers from embarking or disembarking passengers except at one designated location was found to be arbitrary and unreasonable because taxis were not included in the regulatory scheme, although they operate in a manner similar to limousines.⁷⁷

If parking restrictions are carried to their extreme, an actual ban on automobiles from certain parts of the city, there may be an infringement on the fundamental right to travel.⁷⁸ The right to travel clearly is recognized,⁷⁹ although the extent of this freedom is not precisely defined. In a case involving a tax paid only by nonresident commuters one court indicated that interstate migration, not merely interstate movement, is constitutionally protected.⁸⁰ However, in ruling on the issue of whether the failure to provide adequate police protection interferes with the right to travel, another court did not differentiate

76. See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (city regulation prohibited participation in parade or procession without a permit); *Illinois Migrant Council v. Campbell Soup Co.*, 519 F.2d 391 (7th Cir. 1975) (refusal of access to residential community); *Nampa v. Swayne*, 97 Idaho 530, 547 P.2d 1135 (1976) (proceeding to require a leaseholder to remove signs encroaching over public street).

77. *Wilson v. City of Waynesville*, 615 S.W.2d 640, 646 (Mo. Ct. App. 1981). Parking taxes also may present a legal problem. New York State has enacted legislation imposing a tax on the provision of parking, garaging, or storing of motor vehicles within the territorial limits of cities containing one million or more people. N.Y. Tax Law § 1107 (c) (McKinney 1981-82). However, in *Airway Arms, Inc. v. Moon Area School Dist.*, ___ Pa. Commw. ___, 428 A.2d 1028 (Pa. Commw. Ct. 1981), the court invalidated a 15% parking tax imposed on users of parking lots adjacent to the local airport as constituting a violation of the commerce and due process clauses of the United States Constitution. The court also noted that the tax exceeds the limitations established by the local Tax Enabling Act. *Id.* at ___, 428 A.2d at 1029. The court failed to mention *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974), in which a 20% tax on the gross receipts from parking facilities was found to be constitutional. The *Pittsburgh* Court did not, however, preclude the possibility that a taxing statute could violate the due process clause if it is so arbitrary as to constitute an exertion of a nontaxing power, e.g., one involving the confiscation of property. *Id.* at 374-75.

78. For a discussion of this issue, see Note, *Legal Aspects of Banning Automobiles from Municipal Business Districts*, 7 COLUM. J. L. & SOC. PROBS. 412 (1971).

79. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court noted in its decision "[t]hat the nature of our Federal Union and our Constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629.

80. *Salorio v. Glaser*, 82 N.J. 482, 513, 414 A.2d 943, 958, *cert. denied*, 449 U.S. 874 (1980), involved a challenge to a tax paid by New York residents who work in New Jersey. The court found that the increased use of automobiles for commuting purposes may be a justification for imposition of a discriminatory tax, but that the state had not demonstrated that nonresidents were more responsible for resulting emergency transportation situation than were state residents. *Id.* at 504-05, 414 A.2d at 953-54.

between interstate and intrastate travel in referring to the constitutional limitations on interference with the fundamental right to travel. It only eliminated such travel as is particularly local in nature from the sphere of protection.⁸¹ A ban on parking would affect the rights of all persons utilizing the restricted area, including local and out-of-state patrons. Thus, unless constitutional protection only extends to interstate migration, parking regulations may infringe upon the right to travel.

Motor vehicle inspection and maintenance programs are a source of controversy because implementation involves the enacting of state regulations and statutes, and expenditure of state funds.⁸² The constitutionality of this infringement on state sovereignty has been questioned by several circuit courts.⁸³ However, a recent Sixth Circuit decision which involved issues collateral to a vehicle inspection and maintenance program did not challenge the validity of the program itself.⁸⁴ The court found that the EPA's ability to deny registration to vehicles failing to pass the inspection was constitutionally permissible, thus implicitly sanctioning the existence of the vehicle inspection program.⁸⁵

81. See *Tetalman v. Holiday Inn*, 500 F. Supp. 217, 218 (N.D. Ga. 1980). The distinction also must be made between the right to travel and the right to travel by automobile. However, it is contended that the absence of adequate alternative transit modalities effectively would result in an infringement on the right to travel if denial of automobile access to certain areas were legislated. Thus, the legislation would be invalid by constitutional standards. See Note, *Legal Aspects of Banning Automobiles from Municipal Business Districts*, 7 COLUM. J. L. & SOC. PROBS. 412, 431 (1971).

82. See, e.g., *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99, *aff'd.*, 566 F.2d 665 (9th Cir. 1977), in which the Court of Appeals for the Ninth Circuit expressed its displeasure with federal enforcement of state motor vehicle inspection and maintenance programs because, in effect, Congress would be determining the regulations that a state must enact and how it should spend its funds. *Id.* at 831.

83. See *Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975) (invalidation of EPA-promulgated regulations because they direct a state legislature to legislate), *vacated sub nom.* *EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975) (challenge to an EPA-promulgated TCP, which included an inspection and maintenance program), *vacated sub nom.* *EPA v. Brown*, 431 U.S. 99, *reinstated in part and remanded in part sub nom.* *District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975) (the state-federal system would be undermined by permitting the EPA to impose sanctions on a state for noncompliance with EPA regulations), *vacated*, 431 U.S. 99, *aff'd.*, 566 F.2d 665 (9th Cir. 1977).

84. *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981). Following the EPA promulgation of a motor vehicle inspection and maintenance program for inclusion in the Ohio SIP for Cincinnati and Hamilton Counties, Ohio refused to withhold registration from vehicles which failed the emissions test. *Id.* at 1197.

85. *Id.* at 1205.

The government has the power to impose tolls on its streets and highways.⁸⁶ However, courts steadfastly have maintained that such tolls be applied in a non-discriminatory manner⁸⁷ and that alterations in toll rates not impair the contractual obligations between the highway authority and its bondholders.⁸⁸ It is questionable, therefore, whether utilization of differential toll rates⁸⁹ for multiple occupancy vehicles would be upheld. One court, faced with determining the viability of a state statute exempting National Guard members and reservists from payment of a parkway toll, held that the statute was invalid because the parkway authority has the contractual obligation to collect tolls for the benefit of the holders of bonds issued to finance highway construction.⁹⁰ The reduction of toll charges for multiple occupancy vehicles also would reduce the income of the highway authority operating the toll facility and, consequently, the income available for distribution to bondholders. Because the authority is obligated to collect the maximum revenue possible in order to ensure payments to its bondholders any scheme of differential toll rates might be invalidated.

B. Practical Considerations

The utilization of van and car pool programs and tolls for transportation control produce a variety of practical problems which could be solved by careful planning and, in some cases, legislative action.

Van and car pool programs involve statutory, tax, insurance and enforcement difficulties, which might act as a deterrent to their inclu-

86. *Virginia Canon Toll-Road Co. v. People ex rel. Vivian*, 22 Colo. 429, 45 P. 398 (1896) (an individual or corporation cannot exact a toll without a grant from the legislature); *St. Joseph Plank Road Co. v. Kline*, 106 La. 325, 30 So. 854 (1901) (upholding conversion of a public highway into a toll road); *In re Opinions of the Justices*, 81 N.H. 552, 120 A. 629 (1923) (legislature has the power to impose tolls on roads and highways); *In re People*, 70 Misc. 72, 128 N.Y.S. 29 (Sup. Ct. Warren County 1910) (only legislative authority can permit toll charges); *Turner v. Eslick*, 146 Tenn. 236, 240 S.W. 786 (1922) (right to collect tolls is a sovereign prerogative).

87. *See, e.g., Carey Transp., Inc. v. Triborough Bridge and Tunnel Auth.*, 38 N.Y.2d 545, 345 N.E.2d 281, 381 N.Y.S.2d 811 (discriminatory toll charges among similar vehicles based on arbitrary standards), *cert. denied*, 429 U.S. 830 (1976); *Turner v. Eslick*, 146 Tenn. 236, 240 S.W. 786 (1922) (discriminatory application of tolls to horse-drawn vehicles).

88. *New Jersey Highway Auth. v. Sills*, 111 N. J. Super. 313, 268 A.2d 308 (N.J. Super. Ct. Ch. Div. 1970) (invalidating toll exemption for National Guard members and reservists), *aff'd*, 58 N.J. 432, 278 A.2d 489 (1971); *Patterson v. Carey*, 41 N.Y.2d 714, 363 N.E.2d 1146, 395 N.Y.S.2d 411 (1977) (rescission of toll on Jones Beach State Parkway impaired state's contract with bondholders).

89. Differential toll rates are variable toll rates for vehicles of different classifications (*e.g.* weight class, number of axles, or number of occupants).

90. *Sills*, 111 N.J. at 322, 268 A.2d at 312.

sion in state transportation control provisions. Van and car pool programs create a tax liability problem for the driver to the extent that his compensation exceeds his expenses.⁹¹ Programs such as the M.T.A.-sponsored van pool program in Houston resolve this difficulty by limiting the driver's compensation to the cost incurred in providing his transportation.⁹² In addition, if the vehicle owner is compensated, state statutes which regulate the transporting of passengers for compensation must be complied with by the driver and employer.⁹³ Non-compliance could result in substantial fines⁹⁴ and the loss of the permit to continue operating.⁹⁵ To avoid such burdensome effects on all parties concerned the contract carrier regulatory statutes should be amended to provide less stringent regulations and penalties for van pool and car pool programs. This action would prevent statutory deterrence to employer and employee participation.

In the event of vehicular accidents insurance and liability problems arise for the passenger, driver and vehicle owner. Since insurance provisions excluding passengers from coverage are often valid⁹⁶ car pool passengers may find themselves without insurance recourse if the owner-driver's policy excludes them from coverage or if the vehicle owner is totally without coverage. Other types of policy exclusions might result in liability for the vehicle driver. For example, an insurance policy clause excluding uninsured motorist coverage for the operation of vehicles not personally owned, but operated in the course of employment, may be invalid as against public policy. The purpose of the exclusion is to preclude coverage for injuries occurring in certain

91. I.R.C. § 61 (a)(1) (P-H 1981). A recent case demonstrates the tax consequences for a car or van pool driver who receives compensation in excess of his expenses. In *Ireland v. United States*, 621 F.2d 731 (5th Cir. 1980), an executive utilized a company-owned aircraft to travel between his Florida home and the company headquarters in Birmingham, Alabama. The court determined that the I.R.S. correctly had assessed him for the value of the plane rides, and set the fair market value of similar services as the standard of measurement. *Id.* at 737.

92. HOUSTON-GALVESTON AREA COUNCIL, *supra* note 7, at II-6.

93. *E.g.*, N.Y. TRANSP. LAW §§ 202, 203 (McKinney 1975). Section 203 requires that all contract carriers of passengers for compensation by motor vehicle obtain a permit from the Commissioner of Transportation. Section 202 authorizes the Commissioner to establish rules and regulations for supervision of such carriers, examine their books and records, prescribe reasonable rates, and investigate accidents involving such carriers which cause death or injury to persons or property. *Id.* §§ 202 (1)-(4).

94. *E.g.*, N.Y. TRANSP. LAW § 207 (McKinney 1967) (penalty of up to \$1,000 for each act of noncompliance).

95. *Id.* § 206.

96. *See, e.g.*, *Farmer's Alliance Mut. Ins. Co. v. Bakke*, 619 F.2d 858, 888 (10th Cir. 1980) (insurance policy clause excluding passenger from coverage is valid if clear, unambiguous, and highly visible).

locations, thus diluting the effect of the uninsured motorist statute.⁹⁷ Even if this position is accepted, however, it is not settled whether driving a van or car pool vehicle to and from work would qualify as being "in the course of employment."⁹⁸ If it were not so adjudicated, coverage exclusions for the operation of vehicles not owned by the driver may be valid.

The owner's liability for property damage and personal injury incurred in the course of a van or car pool program operated under his auspices could also be quite extensive and require expensive insurance coverage.⁹⁹ A solution to this liability problem would be the establishment of government-sponsored¹⁰⁰ low cost insurance for van and car pool programs, similar to insurance already supplied by the government in areas where private insurance companies cannot economi-

97. *Vidmar v. American Family Mut. Ins. Co.*, 99 Wis. 2d 398, 400, 299 N.W.2d 288, 289 (Ct. App. 1980), *aff'd*, 104 Wis. 2d 360, 312 N.W. 2d 129 (1981). A policeman was injured while on duty and driving a police vehicle. His personal insurance policy contained an exclusion clause for such a situation—operating a vehicle of which he was not the owner in the course of employment.

98. Whether an activity is in the course of employment usually is determined by the presence of employer control. For example, in *Lundberg v. State*, 25 N.Y.2d 467, 255 N.E.2d 177, 306 N.Y.S.2d 947 (1969), decedent was killed while driving home for the weekend from the job site where he resided during the week. The court found that no employer control existed during his drive to and from his home, and, therefore, that the activity was not within the scope of his employment. *Id.* at 471-72, 255 N.E.2d at 179, 306 N.Y.S.2d at 950-51. The *Lundberg* criteria later were employed by the courts in *Ehlenfield v. State*, 62 A.D.2d 1151, 404 N.Y.S.2d 175 (4th Dep't 1978), and *Nero v. Ris Paper Co.*, 60 A.D.2d 340, 400 N.Y.S.2d 825 (1st Dep't 1978), *aff'd*, 46 N.Y.2d 967, 389 N.E.2d 141, 415 N.Y.S.2d 828 (1979), in determining whether employees who were involved in vehicular accidents were acting within the scope of their employment at the time of the accidents in order to justify the imposition of liability upon their employers under the respondeat superior theory.

99. *BARTON-ASCHMAN*, *supra* note 54, at 36.

100. In *Osborn v. Ozlin*, 310 U.S. 53 (1940), the plaintiff sought to invalidate a Virginia statute which required that the insurance business only be conducted through registered agents. The Court stated that it is within the state's power to fix insurance rates, promote insurance, and even "[g]o into the insurance business. . . ." *Id.* at 65-66. This sentiment was reiterated by the Court in *California Auto Ass'n v. Maloney*, 341 U.S. 105, 110 (1951) (validating the California Compulsory Assigned Risk Law, which required all insurers to participate in an assigned risk insurance program). The power of the state to require the purchase of insurance, enact compulsory health insurance, or take over the insurance business also was affirmed in *Borland v. Bayonne Hosp.*, 122 N.J. Super. 387, 398, 300 A.2d 584, 589-90 (Super. Ct. Ch. Div. 1973) (action by union trustees to contest discriminatory hospital rates), *aff'd*, 136 N.J. Super. 60, 344 A.2d 331 (Super. Ct. App. Div. 1975), *aff'd*, 72 N.J. 152, 369 A.2d 1, *cert. denied*, 434 U.S. 817 (1977).

cally provide coverage, such as crop insurance,¹⁰¹ flood insurance,¹⁰² and riot reinsurance.¹⁰³

Central to the difficulties inherent in the utilization of van and car pool programs in SIP's for the achievement of air quality standards is the issue of enforcement. The employer and his employees are not legally bound to participate in the programs. Thus, the EPA or applicable state agencies could not take action against them for noncompliance, and since they are not actually polluters, there is no possibility of a private suit for violation of the Clean Air Act.¹⁰⁴ In *United States v. Ohio Department of Highway Safety*,¹⁰⁵ however, the court determined that the EPA could undertake enforcement measures against a state as if it were an individual in situations where the state fails to prevent use of its streets and highways by vehicles that pollute.¹⁰⁶ By analogy, an employer might be held liable for having an excessive number of polluting vehicles on his premises. Thus, the only viable alternative for the employer and his employees in areas lacking adequate mass transit facilities would be to set up car and van pool programs.

The utilization of a toll strategy for transportation control presents practical difficulties which must be considered prior to implementation—under certain circumstances, tolls may aggravate rather than

101. Federal Crop Insurance Act, 7 U.S.C. §§ 1501-1520 (1976). The Federal Crop Insurance Corporation operates the program and is responsible for offering coverage to appropriate agricultural industries. In *Rainbow Valley Citrus Corp. v. Federal Crop Ins. Corp.*, 506 F.2d 467, 470 (9th Cir. 1974), the defendant's decision to refuse coverage to citrus growers was upheld, since the decision was based on an evaluation of coverage risks.

102. National Flood Insurance Act, 42 U.S.C. §§ 4001-4128 (1976). The government take-over of the flood insurance program was upheld in *National Flood Ins. Ass'n v. Harris*, 444 F.Supp. 969, 972 (D.C.C. 1977).

103. National Insurance Development Program, 12 U.S.C. §§ 1749 bbb 1-21 (1976). The purpose of federal riot reinsurance is to preclude further deterioration of inner city areas due to lack of adequate insurance coverage. Since it may be uneconomical for private insurers to provide proper coverage in such areas the government reinsures their losses. *United States Fire Ins. Co. v. HUD*, 478 F. Supp. 135, 136 (D.C.C. 1979) (the federal party erred in cancelling the plaintiff's riot reinsurance because of its state's failure to comply with certain regulations).

104. 42 U.S.C. § 7604. See note 15 *supra* for a discussion of the citizen suit provision of the Act.

105. 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981).

106. This case involved the issue as to whether the EPA can directly proceed against a state to require enforcement of an EPA-promulgated vehicle inspection and maintenance program. The court found that the EPA could proceed against the state as if it were a person who failed to comply with an EPA directive. The court noted that the state has an affirmative duty to prevent polluting vehicles from using its facilities (highways). *Id.* at 1205.

alleviate the air pollution problem. For example, one of the reasons for the opposition to tolls on New York's East River bridges was the belief that a massive air pollution situation would result at toll plazas because of inadequate vehicle entrance facilities to the toll areas. It is argued that long lines of cars at toll plazas would generate enough air pollution to offset any benefits achieved by reducing the number of vehicles entering Manhattan.¹⁰⁷

V. Conclusion

The wide variety of transportation control strategies available merely emphasizes the limited scope of both the New York and Texas Transportation Control Plans. New York continues to focus on mass transit, although the results have been negligible,¹⁰⁸ and Texas relies almost exclusively on van and car pool programs, whose pollution reduction effectiveness has been questioned.¹⁰⁹ Each state should adopt a more extensive mix of TCP strategies, including, for example,

107. Telephone interview with Victor Ross, Executive Assistant to the Traffic Commissioner, New York Department of Transportation, Bureau of Traffic Operations (Jan. 25, 1982). The principal cause of the anticipated pollution problem in the case of East River Bridge tolls would be the inadequate automobile entrance facilities on the Queens side of the river—where the toll plazas would have been located. The result of imposing the toll strategy on these bridges would, therefore, be to move the pollution from Manhattan to Long Island City, Queens. Mr. Ross indicated that a recent experiment conducted by the Department of Transportation verifies the accuracy of these predictions. The experiment involved routing most of the tunnel lanes between Queens and Manhattan toward Manhattan in the morning and toward Queens during the afternoon rush hour. The result was two to three mile long lines of automobiles waiting to enter the toll plaza, located on the Queens side. Mr. Ross also noted that if toll plaza pollution levels were far in excess of acceptable limits, the possibility existed that citizens' groups could have sought a court order to close the bridges until the tolls were eliminated. Thus, the utilization of a toll strategy to combat air pollution in such a situation could result in an aggravation of the problem it was meant to solve. *Id.*

108. A study by Daniel E. Chall indicated that the New York subway system is in a state of "notorious deterioration." *Bus. Wk.*, May 11, 1981, at 18. This sentiment was echoed in a New York Times article, which noted that "[d]elayed subway trips, commuter-train breakdowns and no-show buses" were threatening to severely injure New York's reputation as a good place to do business. *N.Y. Times*, Apr. 5, 1981, § 1, at 1, col. 1. The Chall study found that during 1980 subway use fell by 2% and auto traffic in Manhattan rose by 3%. The effect of this increased traffic volume on average midtown automobile speeds was that average speeds fell 26%. *Bus. Wk.*, May 11, 1981, at 18.

109. See note 54 *supra* for a discussion of the expected air pollution benefits resulting from expansion of the van and car pool programs. The percentages of reduction for hydrocarbon pollution by 1987 are fairly small compared to the magnitude of the problem.

the increased utilization of a compressed work week.¹¹⁰ Financial incentives also should be provided by the government to employers who initiate such programs, the cost of which would be offset by reduction in monies spent on enforcement of less productive transportation control measures. Innovative and thoughtful planning is needed to deal with the pollution problem—one which threatens the quality of life and health in metropolitan areas.

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110. See note 39 *supra*. In Denver, a compressed work week resulted in a 16% decrease in automobile travel. U.S. NEWS & WORLD REP., Sept. 28, 1981, at 77.